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7 6 **UNITED STATES DISTRICT COURT**

8 7 **NORTHERN DISTRICT OF CALIFORNIA**

9 10 **Case No. 3:23-CV-04597-EMC**

11 12 **ASHLEY GJOVIK, an individual,**

13 14 Plaintiff,

15 16 v.

17 18 **APPLE INC, a corporation,**

19 20 Defendant.

21 **PLAINTIFF'S MEMORANDUM OF**
22 **POINTS & AUTHORITIES**

23 **IN CONDITIONAL NON-OPPOSITION TO**
24 **DEFENDANT'S**

25 **REQUEST FOR JUDICIAL NOTICE**
26 **AT DOCKET NO. 61**

27 **MOTION HEARING:**

28 Dept: Courtroom 5, 17th Floor (Virtual)

29 Date: May 16, 2024

30 Time: 1:30 p.m.

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CASES

<i>Banko v. Apple Inc.</i> , 20 F. Supp. 3d 749, 759 (N.D. Cal. Sept. 27, 2013). -----	2
<i>Banko v. Apple, Inc.</i> , No. 13-02977 RS, 11 (N.D. Cal. Dec. 16, 2013). -----	2
<i>Orr v. Bank of America</i> , NT & SA, 285 F.3d 764, 779 n.26 (9th Cir. 2002). -----	5
<i>Rosenberg-Wohl v. State Farm Fire & Cas. Co.</i> , 20-cv-09316-DMR, 6 (N.D. Cal. Mar. 28, 2022). -----	2
<i>United States v. Corinthian Colls.</i> , 655 F.3d 984, 999 (9th Cir. 2011). -----	2

CONCURRENTLY FILED ATTACHMENTS:

- Exhibits
- Declaration

1 **I. PLAINTIFF'S MEMORANDUM IN CONDITIONAL NON-OPPOSITION TO**
 2 **DEFENDANT'S MOTION REQUESTING JUDICIAL NOTICE**

3 1. Plaintiff, Ashley Gjovik, respectfully submits the following Memorandum of
 4 Points and Authorities in conditional non-opposition to Defendant's latest Motion Requesting
 5 Judicial Notice at Docket No. 61. Exhibits are concurrently filed at Docket No. 65-1 and a
 6 Declaration is concurrently attached at Docket No. 65-2.

8 **II. ISSUES TO BE DECIDED**

10 2. On April 16 2024, Defendant filed a new motion requesting judicial notice of one
 11 document, listed by Defendant as "Exhibit A: Complaint, Banko v. Apple Inc., N.D. Cal. No.
 12 3:13-cv-02977-VC, Dkt. 1 (June 27, 2013)." Docket No. 61-1, Ex. A. Defendant claimed this
 13 Motion was "*in connection with its Reply in Support of its Motion to Dismiss Plaintiff's Third*
 14 *Amended Complaint.*" Def.'s Mot. for Judicial Notice at page 1 and Docket No. 61.

16 3. Replies are not supposed to introduce new facts; however, introducing papers
 17 already filed to this Court in order to clarify arguments made in the instant TAC, Motion,
 18 Opposition, and Reply seems appropriate.

19 4. Apple argues judicial notice is proper due to Plaintiff's arguments related to her
 20 claims for Breach of Implied Contract and Breach of Implied Warranty of Good Faith and Fair
 21 Dealing. Plaintiff agrees the briefing for *Banko v Apple Inc* may be relevant to *Gjovik v Apple Inc*
 22 due to the similarities in legal claims and arguments from both Plaintiffs (Banko and Gjovik) and
 23 Defendant (Apple). Banko and Gjovik also worked in the same Apple Hardware Engineering
 24 organization at the time of their involuntary terminations. *Gjovik v Apple* TAC ¶ 18; *Banko v Apple*
 25 Original Complaint ¶ 19, 38 and FAC ¶ 19, 38.

1 **III. APPLE'S REQUEST IS MISSING REQUIRED DOCUMENTS. EXHIBIT A**
 2 **DOES NOT CONTAIN THE FACTS REFERENCED TO DENY THE**
 3 **MOTION TO DISMISS RELATED TO GOOD FAITH AND FAIR DEALING.**

4 5. Apple notes “*the Court declined to dismiss [Banko’s] ‘Breach of Contract and*
 5 *Breach of Implied Covenant of Good Faith and Fair Dealing’ claim.*” D’s Motion for Judicial
 6 Notice at page 1. Apple adds, “*Apple requests that the Court take notice of the complaint at issue*
 7 *in Banko, not for the truth of the allegations asserted therein, but rather for the fact that the*
 8 *allegations therein were the operative allegations at issue in the motion to dismiss in Banko.*” *Id.*

9 10. However, Apple’s Motion only introduces *Banko*’s Original Complaint for which
 11 the subsequent Order on September 27 2013 did not dismiss the Implied Contract claim, but did
 12 dismiss the Implied Covenant of Good Faith and Fair Dealing claim. *Banko v. Apple Inc.*, 20 F.
 13 Supp. 3d 749, 759 (N.D. Cal. Sept. 27, 2013). A second Order on December 16 2013 later denied
 14 Apple’s motion to dismiss the covenant of good faith and fair dealing claim in *Banko*’s first
 15 amended Complaint. *Banko v. Apple, Inc.*, No. 13-02977 RS, 11 (N.D. Cal. Dec. 16, 2013).

16 17. It is usually not appropriate for a court to grant judicial notice to a defendant for
 18 evidence to support a Fed. R. Civ. Pro. 12(b)(6) motion unless the complaint relies on the
 19 document, the document is central to a party’s claims, and no party questions the authenticity of
 20 the document. *United States v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011). At this phase
 21 of the lawsuit, judicial notice to support a motion to dismiss may only be appropriate “if the court
 22 is to rely on the document in determining whether to dismiss the complaint.” *Rosenberg-Wohl v.*
 23 *State Farm Fire & Cas. Co.*, 20-cv-09316-DMR, 6 (N.D. Cal. Mar. 28, 2022). Accordingly,
 24 Plaintiff supports this request only if the Judge finds the documents needed for the Rule 12(b)(6)
 25 motion.

1 **IV. THE MOTION SHOULD BE GRANTED IF THE REQUEST IS**
 2 **SUPPLEMENTED WITH BANKO'S FIRST AMENDED COMPLAINT.**

3 8. As Apple's Request for Judicial Notice was specific to both the Implied Contract
 4 and the Implied Covenant of Good Faith and Fair Dealing, then the request must include *Banko's*
 5 First Amended Complaint (Docket No 65-1, Exhibit E) in addition to *Banko's* Original Complaint
 6 (Apple's Docket No. 61-1 Exhibit A). Otherwise, the facts pled found to be a plausible claim for
 7 the covenant will not actually be judicially noticed.

9

10 **V. THE REQUEST SHOULD BE SUPPLEMENTED WITH ADDITIONAL**
 11 **FILINGS INCLUDING BANKO'S FAC, APPLE'S TWO MOTIONS TO**
 12 **DISMISS BANKO'S COMPLAINTS, AND BANKO'S OPPOSITION**
 13 **BRIEFING**

14 9. In addition, if Apple would like to request this Court to examine the *Banko v Apple*
 15 *Inc.* case in depth, it seems proper to also include the briefings that were considered by this Court
 16 in making both of the motion to dismiss decisions in *Banko v Apple*.

17 10. True and correct copies are attached to the "Exhibits" document filed to Docket
 18 No. 65-1 and authenticated in the attached Declaration at Docket No. 65-2.

19 11. Attached as, **Exhibit A** is *Apple's* Motion to Dismiss *Banko's* Original Complaint.
 20 See, Case 3:13-cv-02977, Docket No. 11, August 5 2013.

21 12. Attached as **Exhibit B** is *Banko's* Opposition to *Apple's* Motion to Dismiss
 22 *Banko's* Original Complaint. See, Case 3:13-cv-02977, Docket No. 18, August 26 2013.

23 13. Attached as **Exhibit C** is *Apple's* Reply to *Banko's* Opposition to *Apple's* Motion
 24 to Dismiss *Banko's* Original Complaint. Case 3:13-cv-02977, Docket No. 22, September 9 2013.

1 14. Attached as **Exhibit D** is the Order, *Banko v. Apple Inc.*, 20 F. Supp. 3d 749 (N.D.
 2 Cal. 2013). See, Case 3:13-cv-02977, Docket No. 29.

3 15. Attached as **Exhibit E** is Banko's First Amended Complaint. Case Case 3:13-cv-
 4 02977, Docket No. 30, October 25 2024.

5 16. Attached as **Exhibit F** is *Apple's* Motion to Dismiss *Banko's* First Amended
 6 Complaint. See, Case 3:13-cv-02977, Docket No. 32, November 7 2013.

8 17. Attached as **Exhibit G** is *Banko's* Opposition to *Apple's* Motion to Dismiss
 9 *Banko's* First Amended Complaint. See, Case 3:13-cv-02977, Docket No. 33, November 21 2013.

10 18. Attached as **Exhibit H** is *Apple's* Reply to *Banko's* Opposition to *Apple's* Motion
 11 to Dismiss *Banko's* First Amended Complaint. See, Case 3:13-cv-02977, Docket No. 35,
 12 December 2 2013.

14 19. Attached as **Exhibit I** is Order, *Banko v. Apple, Inc.*, No. 13-02977 RS (N.D. Cal.
 15 Dec. 16, 2013). See, Case 3:13-cv-02977, Docket No. 38.

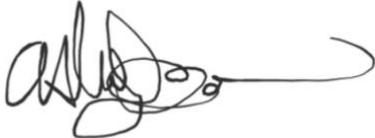
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VI. CONCLUSION

19 20. In conclusion, Plaintiff does not oppose Apple's request for Judicial Notice in the
 20 Motion at Docket No. 61 as long as *Banko's* First Amended Complaint is also included (Exhibit
 21 E). In addition, Plaintiff suggests that the Orders (Exhibits D and H) be included, as well as the
 22 briefings and papers the Orders were based on (Exhibits A, B, C, F, G, H, and I). Finally, if this
 23 Court does not want to review *Banko v Apple* in depth, and as such finds these documents
 24 unneeded, then Plaintiff also has no opposition to this Court denying Apple's Request for Judicial
 25 Notice.

1 **Dated: April 23 2024**

2 **Modified version re-filed to correct file errors: April 25 2024**

3 Signature:

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7

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